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JAMES L. MACKLIN

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA**

In re)	CASE NO. 2010-44610
)	
JAMES L. MACKLIN,)	ADV. NO. 11-02024-E
)	
Debtor,)	
)	
_____)	
JAMES L. MACKLIN,)	DCN: HSB-003
)	
Plaintiff,)	MOTION FOR PRELIMINARY
)	INJUNCTION
-vs.-)	
)	
DEUTSCHE BANK NATIONAL TRUST CO.,)	DATE: March 17, 2011
AS INDENTURE TRUSTEE FOR THE)	TIME: 1:30 p.m.
ACCREDITED MORTGAGE LOAN TRUST)	DEPT.: 33, 501 I St., Sacramento, CA
2006-2 ASSET-BACKED NOTES; and all)	
persons claiming by, through, or under such)	
person, all persons unknown, claiming any legal)	
or equitable right, title, estate, lien, or interest in)	
the property described in the complaint adverse)	
to Debtor's title thereto; and)	
CORRESPONDENT DOES 1-10, Inclusive,)	
)	
Defendant.)	
)	
_____)	

**COMES NOW JAMES MACKLIN, THE PLAINTIFF, AND ASKS THIS COURT TO
GRANT AN INJUNCTION AGAINST DEUTSCHE BANK NATIONAL TRUST CO:**

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

1. Plaintiff asks this court for an injunction prohibiting Deutsche, who wrongfully took this property from him, when it did not have the right to do so, namely it did not own the note, or the obligation thereunder. The Deed of Trust must follow the Note. The Note is the evidence of the obligation. The obligation evidenced by the Note, as of the date of delivery to Deutsche Bank (November, 2009) as indenture trustee for the benefit of "AMLT 2006-2" REMIC Trust, is illegal under the laws of the REMIC Trust (IRS Rule 860 et. seq.) and under the trust agreement established as the Trust Indenture and Sales and Servicing Agreement. This represents a breach of fiduciary duty and is VOID as a matter of law. Because the obligation is VOID as a matter of law, it cannot establish a valid foundation of title for the indenture trustee, Defendant Deutsche. Therefore, any conveyance is also VOID as a matter of law. The trustee, Defendant Deutsche, assumes that the credit bid evidenced in their trustees' deed upon sale is a valid conveyance, however, under Cal. Civ. Code 3439 et. seq., only a party with a valid secured obligation may make such a credit bid. The evidence of the credit bid alone constitutes a fraudulent conveyance. At best, the obligation is unsecured and may not be conveyed as a credit bid under California law.

II. ARGUMENT

2. A party seeking preliminary injunctive relief under Federal Rule of Civil Procedure 65 must show (1) a likelihood of success on the merits, (2) a significant threat of irreparable harm, (3) that the balance of hardships favors the applicant, and (4) whether any public interest favors granting an injunction. *Raich v. Ashcroft*, 352 F.3d 1222, 1227 (9th Cir. 2003), *vacated and remanded on other grounds* by *Gonzalez v. Raich* 545 U.S. 1 (2005). This case meets all the criteria for the issuance of a preliminary injunction.

3. Our court also uses an alternative test that requires the applicant to demonstrate either: a combination of probable success on the merits and the possibility of irreparable injury; or serious questions going to the merits and that the balance of hardships tips sharply in the applicant's favor. *See First Brands Corp. v. Fred Meyer, Inc.*, 809 F.2d 1378, 1381 (9th Cir.

1987). These two tests are not inconsistent. Rather, they represent a continuum of equitable discretion, whereby "the greater the relative hardship to the moving party, the less probability of success must be shown." *Nat'l Ctr. for Immigrants Rights, Inc. v. INS*, 743 F.2d 1365, 1369 (9th Cir.1984).

1. Plaintiff Has A Compelling Case on the Merits.

A. The Note and Deed Were Defective from the Beginning

4. The only possible party(ies) to this transaction who may have a claim have not come forward. Plaintiff has asserted that the subject real property is, and always has been, unsecured. Plaintiff is not asserting that some party in the future may or may not have claims, merely that the property is not secured by any validly executed instrument submitted to the court or filed with the Placer County Records' Office.

5. The Note, together with the Deed, were drafted by the Defendant and their Affiliates (See, Exhibit 1 to Declaration of Dan Edstrom bates number 000096-000097) who had an economic and legal advantage over the Plaintiff. The intent of the parties who drafted these instruments was to circumvent the recording and fee requirements of the county and state wherein the properties lie.

6. The Note defines and describes solely the Lender, Accredited Home Lenders, Inc., as the Obligee/Beneficiary under the Note. Nowhere within the four corners of the Instrument is the name MERS, Inc., MERSCORP., or MERS ever cited, referred to, or expressed or implied, therefore, it is undisputed that the document names the Lender/Obligee as Accredited Home Lenders, Inc. At section eight (8) of the subject Note, (See, Exhibit 1 to the declaration of Jim Macklin) it states "...including the promise to pay the full amount. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. ." If Defendant makes the claim that the "Allonge" is the evidence of the endorsement to the Trust in blank, as required by the REMIC Trust provisions, then the original Lender, or its' successor in interest, is the Obligor under the terms of the Note as it was drafted by the Defendant(s). (See, Exhibit 10 to the declaration of Jim Macklin , the allonge)

7. Within the Deed of Trust, as signed by Plaintiff, the drafters of this trust agreement have erroneously named MERS, Inc. as the Nominee Beneficiary for Accredited Home Lenders, Inc. "Accredited". Nowhere within the four corners of this document is there a reference to an agency appointment, agreement, or expressed or implied agency of MERS to the Lender See, Cal. Civ. Code §§ 2306, 2309, 2932.5; Cal. Civ. Code § 2932.5 "When beneficial interest under the promissory Note is assigned, the assignee may exercise a security interest in real property provided that the assignment is "duly acknowledged and recorded". Under these California Code requirements, the Deed of Trust is defective and cannot convey any beneficial interest through the use of MERS in any capacity. Therefore, the Deed is at the least voidable, and appears to be void under California laws. No security interest can be conveyed by this defective Instrument, which was intentionally drafted by Defendant(s) and their Affiliates. At § 24 of the Deed of Trust 88(EX 2) subject Deed, it states: " The Lender, at its' option...may substitute the trustee by an Instrument acknowledged and executed by the lender." Nowhere within this Instrument, as drafted by the Defendant(s), does it state, imply, or give reference to the Nominee of the Lender being authorized to substitute the trustee. Under Cal. Civ. Code § 2309, "an oral authorization is sufficient....except that an authority to enter into a contract required by law to be in writing can only be given by an Instrument in writing." Since the previous language of the Deed is clear and unambiguous as to the requirement of an Instrument acknowledged and executed, the necessity of compliance with Cal. Civ. Code is mandatory by any alleged agent, which MERS never was or can be.

8. MERS was never the Obligee, never had a right to payment, never received a payment, never had an authorized agency agreement, never held the Note, never conveyed the Note, never had the authority to make substitutions of trustee, and never had any pecuniary or financial interest in the Note, together with the Deed of Trust. These facts are undisputed. By virtue of conversion of a negotiable Instrument (Note) into a non-negotiable security (certificate of security), the Defendant has eliminated the individual security interest of the Note into a completely different obligation, known as "without recourse". This method of financing virtually guarantees that the two principals to the transaction will never know who one another are and also

1 eliminates the newly commingled good(Note) as a secured transaction. Under UCC 9-336,
2 governing securities, any commingled good takes on a new interest separate from the original
3 security. The investors have absolutely no rights to the asset since it was never lawfully held by
4 this trust, or any trust Plaintiff has been able to discover. The intermediaries simply act as fee-
5 based, un-authorized agents of both parties, who are without the knowledge at the beginning to
6 understand who or what they may or may not owe a sum certain.

7 9. Plaintiff refers the court to the following recent Bankruptcy cases whereby MERS'
8 entirety authority to convey interests related to a mortgage is permanently and irrevocably
9 quantified. *In Re: Ferrell L. Agard*, (2011) USBC, Eastern Dist. N.Y. Case No. 810-77338. In
10 Agard, the court found that MERS and its partners decided to create a business model designed to
11 avoid the requirements of mortgage recording processes. The court found nothing presented in
12 evidence that the note in question was properly transferred or endorsed as required by New York
13 law. As argued in this brief, California law requires nothing less. “

14 In *LaSalle Bank, N.A. v. Bouloute*, No. 41583/07, 2010 WL 3359552, at *2 (N.Y. Sup. Aug. 26,
15 2010),
16 the Court concluded that MERS must have some evidence of authority to assign the mortgage in
17 order for an assignment of a mortgage by MERS to be effective. “Because MERS’ members, the
18 beneficial note holders, purported to bestow upon MERS interest in real property sufficient to
19 authorize the assignments of mortgages, the alleged agency relationship must be committed to
20 writing by application of the statute of frauds. In *Landmark v. Kesler*, a decision on MERS, the
21 Kansas Supreme court stated “The parties appear to have defined the word [nominee] in much the
22 same way that the blind men of Indian legend described an elephant- their description depended
23 upon which part they were touching at any given time. *Landmark Nat’l Bank v. Kesler*, 216 P. 3d
158 (Kansas, 2009).

24 In this case Plaintiff has shown the irrefutable and uncontroverted evidence to this Court
25 that MERS attempted to convey interests which they did not possess throughout the Defendants’
26 self-imposed chain of title. Therefore, none of Defendants’ actions can be justified. The power of
27 sale clause within the subject Deed of Trust is void and unenforceable by Defendant and their
28 Affiliates.

B. The Trust and its' Requirements:

10. Defendant claims to represent the beneficial interests of the "Accredited Mortgage Loan Trust 2006-2" REMIC pass-through trust. This trust has been registered under the Securities and Exchange Commission for mortgage-backed securities issuance of certificated interests. Under the laws of New York, the governing trust documents (Sales and Servicing Agreement, Trust Indenture, Prospectus), which fall under New York law. See, Exhibit 2 to declaration of Dan Edstrom. The sales and servicing agreement clearly defines the necessary chain of assignments and necessary endorsements that must be evident in order for the asset (Note and Deed) to be conveyed into this trust and by what date (closing date; June 30th, 2006). See, Exhibit 1 to the declaration of Dan Edstrom, pages 000095-000096).

11. New York Trust Law, which governs and restricts the actions of the trustee, Defendant Deutsche, states every sale, conveyance or other act of the trustee in contravention of the trust is void. N.Y. CLS EPTL § 7-2.4, *Application of Muratori*, 183 Misc. 967, 970 (N.Y. Sup. Ct. 1944); See also: *Dye v. Lewis*, 67 Misc. 2d 426, 324 NYS2d 968 (1972 4th Dept.). "The authority of the trustee to whom a mortgage had been delivered under a trust indenture was subject to any limitations imposed by the trust instrument, and every act in contravention of the trust was void."

12. In order to effectively assign a right in this case, the necessary chain of assignments would have been 1) Accredited must have assigned the Note and deed to MERS by physical transfer and delivery and be duly acknowledged and recorded (Cal. Civ. Code §§ 2932.5, 2306, 2309); 2) MERS, Inc. must assign, by the same method as above, to Accredited Mortgage Loan REIT Trust (Depositor); 3) Accredited Mortgage Loan REIT Trust must assign, as above, to Accredited Mortgage Loan Trust 2006-2 "AMLT 2006-2" must assign, as above, to Deutsche Bank Nat'l Trust Co., as Indenture Trustee on behalf of the equitable investors. This amounts to a total of four (4) separate and individual assignments and endorsements which were never executed. Under NY Code § 7-2.4, the asset must be conveyed pursuant to the language of the trust agreement ...punctiliously, or the conveyance is void. No attempt to comply with this mandate is evident anywhere in any records evidenced to any Court.

1 13. Further, assuming arguendo that MERS did have the authority to convey any
2 beneficial interests, the Note and Deed must have been conveyed by June 30th, 2006 (See,
3 Exhibit 1 to the declaration of Dan Edstrom, pages 000095-000096). Without these requisite
4 assignments, the trust lacks the critical standing to bring any action, especially by its' trustee,
5 Defendant Deutsche Bank. Any alleged attempted conveyance is void from the beginning.

6 14. The only alleged assignment to Defendant of beneficial interest comes from an
7 alleged MERS agent See, Exhibit 3 to the declaration of Jim Macklin, wherein a "Wayne
8 Hessler", as a duly appointed officer of Select Portfolio Services, as Attorney-in-fact for Deutsche
9 Bank, on behalf of the certificate holders of "AMLT 2006-2", executes a Substitution of Trustee in
10 favor of "Quality Loan Services ("QLS") which then grants the alleged authority for "QLS" to
11 convey title to Deutsche in the subsequent trustees sale. Under Cal. Civ. Code § 1095, this
12 represents a counterfeit and a forgery executed by Defendant, Deutsche and its' Affiliates at the
13 direction of the Defendant. A series of impossibilities exists for many reasons, not the least of
14 which is: "Wayne Hessler" executed this substitution of trustee before the Corporate assignment
15 of Deed granted any beneficial interest to Deutsche Bank as Indenture Trustee (See, Exhibit 3, the
16 declaration of Jim Macklin) which would grant authority to "Wayne Hessler" to substitute any
17 trustee. But worse, the Corporate Assignment of Deed of Trust, together with the Note, is a
18 blatant impossibility. If the Note was assigned into this trust back in June, 2006, how and why
19 would a second assignment be effected or even necessary? And where is the original, trust
20 mandated assignment by Accredited or MERS? And, how would MERS purport to assign the
21 beneficial interests of its' principal, Accredited Home Lenders, Inc., during the pendency of their
22 bankruptcy without the express written permission and authority of the Bankruptcy Trustee (filed
23 April, 2009)? Without the necessary chain of assignments and endorsements, the "AMLT 2006-2"
24 REMIC Trust cannot ever make the claim that it is the creditor and, thus, Deutsche Bank as
25 Indenture Trustee, cannot represent their interests in this, or any, Court in California.

26 15. As noted at *In Re Vargas*, 396 B. 511, 519-17, under the Federal Rules of
27 Evidence, particularly Rule 803, "MERS could never satisfy the requirements of the application of
28 computerized records in the Ninth (9th) Circuit. MERS has no employees and no first-hand

knowledge of evidence necessary for testimony.” Again, assuming arguendo that MERS made a valid assignment, they never held the Note or were entitled to payment, and, there is no competent fact witness that Defendant Deutsche may rely upon for testimony or has brought forth in this matter.

C. Notice of Default was Defective

16. Plaintiff contends there is a serious misrepresentation and in fact false representation in the Notice of Default, the Notice of Trustee’s Sale and the Trustee’s Deed Upon Sale.

17. Material misstatements allow a court to void a trustee’s sale. *Angell v. Superior Court*, 73 Cal.App.4th 691, 699-700 (1999); *Little v. CFS Service Corp.*, 188 Cal.App.3d 1354, 1360 (1987). Here, the Notice of Default identified MERS as the beneficiary, rather than Accredited or Deutsche (See, Exhibit 3 to the declaration of Jim Macklin) This statement is crucial, as the beneficiary determines when a default has occurred and what the homeowner can do to cure it. *In re Maisel*, 378 B.R. 19, 21- 22 (Bankr. D. Mass. 2007); *In re Nosek*, 386 B.R. 374, 380 (Bankr. D. Mass. 2008). A homeowner who finds himself in default wants to contact the entity that has the power to deal with his loan. It thus is vital that the Notice of Sale identify the *actual* beneficiary. In Mr. Macklin’s case, the Notice of Default said the beneficiary was MERS. (Macklin Dec., at ¶ 4, Exhibit 1, at page 000003.) However, it directed him to contact Windsor Management Company for help, rather than MERS. (*Ibid.*) According to the Trustee’s Deed of Sale, Quality Loan Service Corporation was the beneficiary under Macklin’s Deed of Trust, who sold the property to Deutsche. (See, Exhibit 3 to the declaration of Jim Macklin Macklin) However, the Accredited Mortgage Loan Trust 2006-2 Asset Backed Notes was created on June 1, 2006, according to the Master Sales and Servicing Agreement filed with the Securities and Exchange Commission. (By that point, the Accredited Mortgage Loan Trust 2006-2 Asset Backed Notes had to have purchased the Macklin loan, along with thousands of others.

18. According to Deutsche’s own documents, it believes it owned the loan as of 2006. When the Notice of Default was issued in 2008, it should have identified Deutsche as the trustee, rather than MERS. The Notice should have directed Macklin to Deutsche, rather than Windsor

1 Management. The Notice of Default made a material misrepresentation when it said the
 2 beneficiary was MERS and advised Macklin to call Windsor to keep his home. That
 3 misrepresentation voids the sale and means the Trustee's Deed of Sale should be cancelled and
 4 title restored to Mr. Macklin.

5 **D. The Sale of Mr. Macklin's Home is Void**

6 19. The note, at issue here, made payable to Accredited Home Lenders, Inc., is a
 7 negotiable instrument as defined by UCC and Cal. Commercial Code, providing for interest and
 8 an unconditional promise to pay the lender, Cal. Comm. Code §3104. A party is entitled to
 9 enforce a negotiable instrument if it is "the holder of the instrument, a nonholder in possession of
 10 the instrument who has the rights of a holder, or a person not in possession of the instrument who
 11 is entitled to enforce the instrument. *Cal. Comm. Code §3301*.

12 20. The court may ask who is the "holder of the note? Cal Commercial Code
 13 §1201(20) defines a holder as "the person in possession if the instrument is payable to bearer or, in
 14 the case of an instrument payable to an identified person, if the identified person is in possession."
 15 "Mere ownership or possession of a note is insufficient to qualify an individual as a 'holder'."
 16 *Adams v. Madison Realty & Dev. Inc., 853 F.2d 163, 166 (3d Cir. 1988)*. Where, as here, the
 17 ownership of an instrument is transferred, the transferee's attainment of the status of "holder"
 18 depends on the negotiation of the instrument to the transferee. *Cal. Comm. Code §3201(a)*.

19 21. The two elements required for negotiation, both of which are missing here, are the
 20 transfer of possession of the instrument to the transferee, and its endorsement by the holder. *Cal.*
 21 *Comm. Code §3201(b)*. Also, *See: Cal. Comm. Code §3302(a),(1),(c), wherein "A person does not*
 22 *acquire rights of a holder in due course of an instrument taken (1) by legal process or by purchase*
 23 *in an execution, (2) by purchase in an execution, bankruptcy, or creditors' sale or similar*
 24 *proceeding*. The instrument may not bear evidence of a forgery. Plaintiff contends the Allonge
 25 produced to him by Defendants is a forgery. See, Exhibit 10 to the declaration of Jim Macklin.
 26 As to the issue of possession, we are not certain on this record whether the party in possession of
 27 the note is before this court. What we do know is that the note was allegedly purchased by the
 28 "Depositor" (Accredited Mortgage REIT Trust, a different entity than the Accredited Mortgage

1 loan Trust 2006-2) to the REMIC Trust but never came into the possession of the Depositor, as
2 evidenced by the lack of recording a duly acknowledged and recorded instrument within the land
3 title records in Placer County. Because the Depositor never had possession of the note, it can not
4 qualify as a “holder” under the California UCC and, therefore, cannot ever assign interest in that
5 which it never possessed.

6 22. The second element required to negotiate an instrument to the transferee, i.e.,
7 endorsement of the instrument by the holder, is also missing here. *Cal. Comm. Code §3204*. An
8 endorsement means “a signature, other than that of a signer as maker, drawer, or acceptor, that
9 alone or accompanied by other words is made on an instrument for the purpose of negotiating the
10 instrument, restricting payment of the instrument, or incurring endorser’s liability on the
11 instrument. The endorsement may be on the instrument itself, or it may be on “a paper affixed to
12 the instrument.” *Id.* Such a paper is called an “allonge”, defined as “[a] slip of paper sometimes
13 attached to a negotiable instrument for the purpose of receiving further endorsements when the
14 original paper is filled with endorsements.” See *Black’s Law Dictionary* at 88 (9th Ed. 2009).
15 The significance of endorsement and affixation requirements to achieve holder status, and thereby
16 qualify to enforce a note against the maker, was explained by the Third Circuit in *Adams v.*
17 *Madison Realty & Dev. Inc.*, 853 F.2d at 168. The court explained that the maker of the note must
18 have certainty regarding the party who is entitled to enforce the note. From the maker’s standpoint,
19 therefore, it becomes essential to establish that the person who demands payment of a negotiable
20 instrument, actually has been lawfully assigned the Note, together with the Deed, with the
21 necessary and identifiable endorsements. Otherwise, the obligor is exposed to the risk of double
22 payment, or at least to the expense of litigation incurred to prevent duplicative satisfaction of the
23 instrument. These risks provide makers with a recognizable interest in demanding proof of the
24 chain of title. Consequently, plaintiff here, as maker of the note, may properly press defendant to
25 establish its holder status.

26 23. Since Defendant Deutsche has only offered into evidence in this court a rebuttable
27 presumption of “duly perfected” title in the form of a trustees’ deed upon sale, and has never made
28 the claim that it is or was a holder of the original Note with lawful endorsements, containing all of

1 the intervening assignments, as required by the controlling Sales and Servicing Agreement, (See,
2 Exhibit 2 to the declaration of Dan Edstrom, pages) they cannot dispossess Plaintiff of his
3 property.

4 24. Further, Defendant must make the claim before this court that they are, in fact, the
5 true creditor and holder of the original instrument Note, with all of the proper endorsements and
6 duly acknowledged and recorded intervening assignments of the Deed, with the entitlement rights
7 to enforce such. Defendant never even alleges that they are a holder who is entitled to enforce the
8 Note, nor can they, based upon the evidence before this Court. The allonge See Exhibit 10 to the
9 declaration of Jim Macklin, is facially defective and contains absolute proof of Defendants'
10 attempt to create a valid endorsement without authority, thereby evidencing a false and misleading
11 filing in this Court. There is not even a date stamp upon which the Court may rely upon as to
12 accuracy and timeliness of the alleged assignment. Also, the allonge evidences only a "mark" as a
13 signature without identifying an individual who may be called upon to testify as to the validity of
14 this endorsement. Lastly, the allonge contains no Notary stamp to verify the date and person
15 authorized to execute such an instrument.

16 25. Under the chain of intervening assignments required by the Sales and Servicing
17 Agreement, (See, Exhibit 2 to the declaration of Dan Edstrom, pages 000096-000098), which is
18 the controlling document that would evidence the mortgage loan trust as the real party in interest,
19 it is impossible for Defendant to make the claim that these series of mandatory assignments and
20 endorsements are lawfully executed, establishing the legal foundation for their alleged trustees
21 deed upon sale..

22 26. Defendant Deutsche Bank acts as agent, allegedly, for the equitable investors of the
23 REMIC Trust and cannot act outside of the authority or capacity of its' principal. See, *e.g.*, *Greer*
24 *v. O'Dell* , 305 F.3d 1297, 1303. The signatures of the remaining certificate-holders of "AMLT
25 2006-2" REMIC Trust, in their voting majority and signed under penalty of perjury, must be
26 evidenced to this court in order for the equitable claim of a person entitled to enforce and
27 possession of the original Note, together with the Deed, to be made by Defendant on behalf of the
28

investors as principal. (See, Exhibit 1 to the declaration of Dan Edstrom) *Trust Indenture, Section 5.03, 5.06, mandatory vote by majority authorizing any and all actions by the trustee, Deutsche.*

27. The entirety of this matter, as discussed above, has been adjudicated by the Bankruptcy Court in nearly identical fashion by Chief Judge Judith Wizmur, *U.S. Bankruptcy Court, District of New Jersey, In Re: John T. Kemp; Kemp v. Countrywide, Case No. 08-18700-JHW. Nov. 16th, 2010.*

28. In Re: Rickie Walker, Eastern District of California, Bankruptcy Case No: 10-21656 the court noted, It is well established Ninth Circuit Law that assignment of the Deed does not assign the underlying Note and the right to payment, and that the security interest is an incident of the debt : 4 Witkin Summary of California Law, Secured Transactions in Real Property § 105 (10th edition).” (In Re: Walker); In re: foreclosure cases, 521 F Supp. 2d 650, 653 (S.D. Ohio 2007); In Re Vargas B.R. 511, 520 (BK. CD Cal. 2008); Landmark Nat’l Bank v. Kesler, 216 P. 3d 158 (Kansas, 2009); La Salle Bank v. Lamy, 824 N.Y.S. 2d 769 (N.Y. Sup. Ct. 2006); Also See: *In Re Agard, N.Y., Case No. 810-77338, US B.K., Eastern Dist. N.Y.*

29. Under Cal. Civ. Code 2936 the holder of the note prevails regardless of the order in which the interests were transferred. See, *Adler v. Sargen*(1895) 109 Cal. 42, 49-50.

30. Defendant has offered no evidence that the rebuttable presumption that the trustees’ deed is valid. The trustees’ deed is predicated on a series of facially and substantively false and misleading documents known by defendant to be criminally false and defective See, Cal. Penal Code §§ 115, 530.5, 470-483 et. seq. Defendant, in fact, has offered into evidence in the related civil case, an “allonge” which again, on its’ face, is incomplete and void for defect. See, Exhibit 10 to the declaration of Jim Macklin, the allonge. An allonge is only allowable if there is no room on the Note itself for an endorsement. See, *Pribus v. Bush* (1981) 118 Cal. App. 3d 1003.

31. The copy of the Note, is disputed as to its’ authenticity by Plaintiff, I as the back side of the instrument has more than enough room to provide for the missing endorsement, much like a person would endorse the back of a check (negotiable instrument). Nowhere on this allonge is a named person identified, a date of the alleged endorsement, or a Notary stamp evident. The allonge is ineffective and shows that Defendant is not a holder-in-due-course because they are not

1 a holder at all. Plaintiff is informed and believes that as a result of the woefully poor evidence
 2 presented by Defendant in this case, the most likely creditor, if any now exists, would be the
 3 original “lender”, Accredited Home Lenders, since no other form of legal or lawful assignment or
 4 endorsement is in evidence before this court, yet they have not brought forth a claim, nor would
 5 they be able to under their current bankruptcy status. It appears that the Plaintiffs’ Note and deed
 6 were not named as an asset in the Bankruptcy estate of Accredited Home Lenders, Inc. Failure to
 7 list a mortgage loan as property of the bankruptcy estate is a criminal violation of *Title 18, U.S.C §*
 8 *152* .

9 32. Under Uniform Commercial Code section 3-202(2), an allonge must be so firmly
 10 affixed to the instrument that it becomes part of it in order for the endorsements to be valid.
 11 Endorsements on an allonge are often considered invalid if there is still room on the instrument for
 12 endorsements. See: New York State Law Re: Allonges; Blacks Law, 9th at 88, Definition of
 13 “allonge”. Negotiable Instruments, especially promissory notes as an unconditional promise to pay
 14 a sum certain to a person certain, fall under the strict authority of the Uniform Commercial Code.

15 33. “[Defects] and irregularities in a sale under a power render it merely voidable .
 16 However, substantially defective sales have been held void where the defect lay in a particular as
 17 to which the statutory provision was regarded as mandatory. See, *55 Am.Jur.2d, Mortgages, §*
 18 *746, p. 673) § 775, p. 691*. Because the Trustee’s Deed and the Notice thereof is predicated upon
 19 the authority of the trustee, as substituted by MERS without authority, the recitals within the
 20 trustee’s sale is void.

21 34. Importantly, the Loan Application (See, Exhibit 4 to the declaration of Jim
 22 Macklin) and its Accompanying Underwriting Transmittals (See, Exhibit 5 to the declaration of
 23 Jim Macklin), Credit Report, Appraisal of Real Property (See Exhibit 4 to the declaration of Jim
 24 Macklin, and all documents See, Exhibit 6 -8 to the declaration of Jim Macklin used internally as
 25 Authority to “Lend” Are forgeries and filled with false information as input by Defendant and
 26 Defendants’ affiliates.

27 35. As can be seen on Exhibit 6, the original lender, “Accredited, imputed, or caused
 28 to be imputed, certain vital information as it regarded Plaintiffs’ monthly income, length of time

1 residing at subject property, assets on hand (cash in the bank), value of subject real property, years
2 of employment, and total debt-to-income ratio. This is verified by the brokers' admission (See,
3 Exhibit 6 to the declaration of Jim Macklin, page 4, bottom left) that, in fact, the entire loan
4 application information was derived from a telephone interview, yet Plaintiff provided all income
5 and tax information as it was a full doc. transaction. The appraised value given to the subject real
6 property is defined as \$615,000.00, however, the appraised value jumps to \$665,000.00 without
7 any notice to the Borrower (See, Exhibit 4 to the declaration of Jim Macklin). The Borrower is
8 imputed as having \$65,000.00 in a Wells Fargo account that never had that amount in it, ever.
9 Plaintiffs' debt-to-income ratio is expressed as approximately 21%. This was false. In Exhibit 6, to
10 the declaration of Jim Macklin, the confirmation of a "full doc" loan is evidenced by the lender,
11 Accredited, meaning that the Borrowers' income tax returns and income statements must have
12 been verified by some person of authority within the lenders' personnel. However, a simple review
13 of the Plaintiffs' 2005 federal income tax return, See, Exhibit 8 to the declaration of Jim Macklin)
14 Exhibit Ex. 8, shows that Plaintiff earned \$100,484.00 in the taxable year prior to the loan year,
15 not the imputed amount of \$352,000.00. This false and misleading information was inserted into
16 Plaintiffs' application, without his knowledge, asserting that the monthly income of Plaintiff was
17 \$29,360.03. Because this was, in fact, a full doc loan, and Plaintiff supplied the lender, an affiliate
18 of defendant, with the true and correct tax returns and income statements, the lender has
19 represented false and misleading information to the true equitable investors.

20 36. This amounts to securities fraud. Exhibit 9 to the declaration of Jim Macklin
21 indicates that a "warehouse lender" was used in this transaction, which is evidence of a
22 violation of Reg. Z (table funding) and is further evidence that Plaintiff had no opportunity
23 to know the true character of the loan or its' terms and conditions as defined by the
24 REMIC Trust documents.

25 37. The lender conveyed a predatory loan into the securitization trust and
26 blatantly violated the terms and conditions of the "AMLT 2006-2" trust. This also violates
27 N.Y. laws of trust and CLS EPTL § 7-2.4 apply here, as well. The trust cannot hold a
28 predatory loan, or its' payment stream as a derivative, as an asset of the trust or it violates

1 the trust agreements. The lender, Accredited, was acting in concert with Defendant,
 2 Deutsche Bank, as evidenced by the trust agreements themselves. Signatures by both
 3 lender and Defendant acted in concert and filed these documents with the S.E.C., under
 4 oath and penalty of perjury.

5 *E. Mers, Windsor Mangement Company, Quality Loan Service Corporation had No*
 6 *Power to Foreclose as they did not hold the requisite interest in the Note or Deed of*
 7 *Trust.*

8 38. The real question is who legally had the power to begin the foreclosure on Mr.
 9 Macklin's home by declaring a default. As one court has held, "those parties who do not hold the
 10 note or mortgage and who do not service the mortgage do not have standing to pursue motions for
 11 relief or other actions arising from the mortgage obligation." *In re Nosek*, 386 B.R. at 380; *In re*
 12 *Schwartz*, 366 B.R. 265, 270 (Bankr. D. Mass. 2007). Another court ruled, "The plaintiff must
 13 show that it is the holder of the note and the mortgage at the time the [foreclosure] complaint was
 14 filed. The foreclosure plaintiff must also show, at the time the foreclosure action is filed, that the
 15 holder of the note and mortgage is harmed, usually by not having the received payments on the
 16 note." *In re Foreclosure Cases*, 521 F.Supp.2d 650, 653 (S.D. Ohio 2007).

17 39. These cases follow an old rule of promissory note law—only the owner or "holder"
 18 of a note can enforce it. "'Holder' with respect to a negotiable instrument, means the person in
 19 possession if the instrument is payable to the bearer. . . .[¶] The term 'holder' is similarly defined
 20 when used in connection with a mortgage. . . (mortgage holder is 'one to whom property is
 21 mortgaged; the mortgage creditor or lender.'" *In re Nosek*, 386 B.R. at 380, *quoting* M.G.L.A. 106
 22 § 1-201 (20), *and* BLACK'S LAW DICTIONARY, 1034 (8th ed. 2004).

23 40. California law follows this rule, as the California courts only allow the holder of a
 24 mortgage to enforce rights under the mortgage, including the right to foreclosure on and sell the
 25 property. *Pribus v. Bush*, 118 Cal.App.3d 1003, 1009-1010 (1981). This rule is a logical
 26 extension of the principle that only parties to a contract can sue to enforce it. *Buckner v. Tamarin*,
 27 98 Cal.App.4th 140, 142 (2002), *quoting Benasra v. Marciano*, 92 Cal.App.4th 987, 990 (2001).
 28 During the foreclosure proceedings, and during the unlawful detainer action, Deutsche never

1 offered any documentary proof that it owned Macklin's loan. It never proved it was the "holder."
 2 It never produced evidence that MERS or Accredited had assigned it the note and that it had
 3 recorded the assignment. (See, the declaration of Jim Macklin, paragraphs 17-20)

4 41. The California foreclosure statutes must be strictly construed. Failure to follow the
 5 statutes means a foreclosure sale must be overturned. *Anderson v. Heart Federal Savings and*
 6 *Loan Association*, 208 Cal.App.3d 202, 211 (1989); *Miller v. Cote*, 127 Cal.App.3d 888, 894
 7 (1982). The statutes require that the actual holder of the note prove it is the owner when it starts
 8 the foreclosure process. Because Deutsche never presented evidence it was the holder of
 9 Macklin's loan, and cannot prove ownership now, the foreclosure on Macklin's home should be
 10 overturned.

11 *F. The Deed of Trust must be Strictly Construed*

12 42. Deeds of Trust are governed by the law of trusts, but, because the power of sale is
 13 drastic, the Deed of Trust must be narrowly interpreted. *Bank of America v. La Jolla Group*, 129
 14 Cal.App.4th 706, 712 (2005). "A power of sale in a deed of trust is a creature of contract, arising
 15 from the parties' agreement. . . . The statutory scheme governing non-judicial foreclosures does
 16 not expand the beneficiary's sale remedy beyond the parties' agreement, but instead provides
 17 additional protection to the trustor. . . ." *Ibid*. Mr. Macklin is the Trustor of his own trust. The
 18 Macklin Deed of Trust said that it secured "to Lender: the repayment of the Loan, and . . . the
 19 performance of Borrower's covenants and agreements under this Security Instrument and the
 20 Note. . . ." (See, Exhibit 2 to the declaration of Jim Macklin). The Deed of Trust included power
 21 of sale language, but required the "Lender" to give notice to Macklin if it intended to declare a
 22 default and sell the property. (See, Exhibit 2 to the declaration of Jim Macklin) The "Lender" was
 23 Accredited. The Deed of Trust never defined the word "Lender" to include possible successors or
 24 assigns of Accredited. Strictly construed, the Deed of Trust gave Accredited alone the right to
 25 declare a loan default. The document does not mention MERS, Windsor Management or Quality
 26 Loan Service Corporation. Accredited drafted the document and it was presented to Mr. Macklin
 27 on a "take it or leave it" basis. This is an adhesion contract and must be construed against the
 28

1 drafter. Accredited which is now in bankruptcy, remains responsible for any deed of trust defects.
2 Those defects should not be ignored so Deutsche can take Mr. Macklin's home.

3 43. It is an undisputed fact that MERS has never owned, held, or been a party entitled
4 to enforce the Note in this instant matter. MERS has never been named or implied as the obligee
5 under the Note).

6 44. In California, MERS cannot be the Beneficiary on any Deed absent being the
7 obligee of payment. MERS was never the trustee under the deed of Trust. As the beneficiary
8 only, MERS was never the obligee under the note and had no powers of trustee as set out Cal.
9 Probate Code §17200. However, under the deed of trust in this case, Mr. Macklin is the
10 "remainder beneficiary" under the subject Deed and has the right to direct the trustee of a
11 defective Deed of Trust. (See, Exhibit 2 to the declaration of Jim Macklin)

12 45. The deed has erroneously named MERS as beneficiary without the corresponding
13 Note ever naming MERS anywhere within the Instrument. Since defendants' sole representation to
14 this court is the rebuttable presumption that it somehow has magically acquired beneficial interest
15 by assignment from MERS, a party who never possessed the Note or was entitled to payment
16 under the Note, then the burden of proof falls upon the party making such a claim. As this court
17 recognizes, MERS as the beneficiary under the Deed of trust, must be the obligee. The beneficiary
18 must be the obligee of the secured transaction (usually the payee of a Note), because otherwise the
19 deed of trust in its' favor is meaningless. *Watkins v. Bryant* (1891) 91 C 492; *Nagle v. Macy*
20 (1858) 9 C 426. The deed is merely an incident of the obligation and has no existence apart from
21 it. *Goodfellow v. Goodfellow* (1933) 219 C 548; *Adler v. Sargent* (1895) 109 C 42; *Turner v.*
22 *Gosden* (1932) 121 CA 20.

23 46. The only assignment ever recorded by MERS was during the pendency of its'
24 principal, Accredited's bankruptcy. Because, MERS cannot and does not possess "agency
25 status", as directed by a writing it cannot effect any transfer or assignment. *See, Cal. Civ. Code §*
26 *230...: "agent can never have authority, actual or ostensible, to do an act which is...known to be a*
27 *fraud upon the principal."*
28

1 47. In this case, there is no writing authorizing MERS to transfer a beneficial interest
2 under the note. Under, Cal. Civ. Code§ 2309... “an oral authorization is sufficient...except that
3 an authority to enter into a contract required by law to be in writing can only be given by an
4 instrument in writing.” Further, under Cal. Civ. Code § 2932.5... “when beneficial interest under
5 the promissory note is assigned, the assignee may exercise a security interest in real property
6 provided that the assignment is “duly acknowledged and recorded. There is no such assignment,
7 much less a acknowledged or recorded. MERS was regularly used by the banking industry to
8 record false deeds and other untrue documents in the County Recorder’s Office, without the
9 proper assignment to do so. This entire transaction is a violation of California recording laws.
10 Furthermore, it is an unfair business practice prohibited by California Business and Professions
11 Code §17200. While physical possession of the note is not required, a recorded interest in the note
12 must be both acknowledged and recorded. Under California Civ. Code § 2932.5, when the
13 beneficial interest under the promissory note is assigned, the assignee may exercise a security
14 interest in real property provided that the assignment is “duly acknowledged and recorded.” No
15 such recording exists in this case.

16 48. Defendant has attempted to evidence a rebuttable trustees’ deed which, upon
17 inspection of the preceding foundational recordations made by showing this is a false deed. See,
18 Macklin Exhibit 3. The filing of and presentation of these false documents, Defendants’
19 vexatious pleadings (See *Yau v. Deutsche*, U.S. District Court for the Central District, Case No:
20 SACV11-6 JVS) throughout the both the federal and state court systems, represents a pattern of
21 conduct by the Defendant(s) against the citizens of this state. The Court must discover the
22 substance of the contentions presented by Defendant, especially since the Plaintiff has rebutted the
23 presumption of validity of the recorded documents.

24 49. 11 U.S.C. Section 105(a) permits a bankruptcy court to issue remedies for
25 “wrongful conduct, such as bad faith or unreasonable, vexatious conduct, by any party or
26 representative that has appeared before the court.” *In re Cabrera-Mejia*, 402 B.R. 335, 346
27 (Bankr. C.D. Cal. 2008). Pursuant to section 105(a), a court may issue sanctions where a party or
28 counsel has violated a court order or rule. *In re Evergreen Sec., Ltd.*, 570 F.3d 1257, 1273 (11th

Cir. 2009); *Galloway v. EMC Mortgage Corp. (In re Galloway)*, 05-13504, 2010 WL 364336, at
 *5 (Bankr. N.D. Miss. Jan. 29, 2010) (imposing sanctions for violation of a confirmation order); *In*
re Stone, 166 B.R. 269, 274 (Bankr. W.D. Pa. 1994). A court may issue sanctions pursuant to
 section 105(a), among other reasons, if a party has made false statements or filings to the court.
See Goldman v. Morgan (In re Morgan), 573 F.3d 615, 628 (8th Cir. 2009) (affirming removal of
 chapter 13 trustee as sanction pursuant to section 105(a) for giving misleading testimony); *Watson*
v. Stonewall Jackson Mem'l Hosp. Co. (In re Watson), No. 10-1292, 2010 WL 4496837, at *3
 (Bankr. N.D.W.Va. Nov. 1, 2010). “When a creditor files a false or fraudulent proof of claim,
 which is deemed allowed by § 502(a), and entitled to prima facie presumption of validity and
 amount by Rule 3001(f), the creditor is abusing the bankruptcy process.”); *In re Jacobsen*, No. 07-
 41092, 2009 WL 3245418, at *16 (Bankr. E.D. Tex. Sept. 30, 2009) (imposing sanctions pursuant
 to section 105(a) against 3 debtor for filing materially misleading schedules and falsifying other
 documents used in the bankruptcy proceeding); *In re Varona*, 388 B.R. 705, 717 (Bankr. E.D. Va.
 2008) (after extended analysis, concluding that “the Court’s power to remedy and punish for the
 filing of a false or fraudulent claim is within the strictures of its authority pursuant to 11 U.S.C. §
 105”).

50. The remedial use of section 105 is not limited by a requirement that bad faith be
 demonstrated for the court to act. *In re Dempsey*, 247 F. App’x 21, 25 (7th Cir. 2007) (holding
 court’s use of section 105(a) to impose a one-year filing bar was justified despite absence of bad
 faith); *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1190 (9th Cir. 2003) (holding that a
 court’s use of its contempt power under section 105 does not require bad faith); *Bartock v. BAE*
Systems Survivability Sys., LLC (In re Bartock), 398 B.R. 135, 161 (Bankr. W.D. Pa. 2008);
Cochran v. Reatch (In re Reath), No. 06-1531, 2006 WL 3524458, at *6 (Bankr. D.N.J. Dec. 6,
 2006); *see also In re Evergreen Sec., Ltd.*, 570 F.3d at 1273 (requiring bad faith for a court to
 sanction a litigant pursuant to its inherent authority but not mentioning bad faith as a requirement
 for sanctioning a litigant pursuant to section 105). The court’s power to remedy an abuse of
 process or the violation of a court’s order should not hinge on the intent (or lack thereof) of a
 litigant, but rather on the effect that a litigant’s actions have on the court’s proceedings regardless

1 of whether the abuse or violation was in bad faith or otherwise. Plaintiff is informed and believes
 2 that Defendant has purposefully failed to file any proof of claim in this case to avoid the certainty
 3 of perjury and fraud upon this Court. The reliance of Defendant on the invalid, trustees' Deed
 4 upon Sale which was not surprisingly filed as an "accommodation only" to avoid liability and
 5 culpability, shows the intent of omission of foundation evidence supporting their claim.

6 51. If the court cannot declare the true creditor in this case, at least it can declare
 7 Deutsche has no standing a creditor in this case and that it wrongfully holds title to property which
 8 rightfully belongs to Mr. Macklin.

9 *G. Deutsche is Not a Bona Fide Purchaser*

10 52. Deutsche contends that the Notice of Default and Notice of Sale and Trustee's
 11 Deed Upon Sale complied with the foreclosure statutes. These recitals, according to Deutsche, set
 12 up a conclusive presumption that the foreclosure was proper. Yet, the presumption applies only if
 13 the person who buys a home at a foreclosure sale is a bona fide purchaser. *Homestead Savings v.*
 14 *Darmiento*, 230 Cal.App.3d 424, 436 (1991). Unless a bona fide purchaser has bought the
 15 property, the presumption is not conclusive, and can be rebutted. *Moeller v. Lien*, 25 Cal.App.4th
 16 822, 831-832 (1994); *Homestead Savings v. Darmiento*, 230 Cal.App.3d at 436. Deutsche cannot
 17 claim to be bona fide purchaser. The Trustee's Deed of Sale identified it as the grantee and was
 18 sold the property under the original Deed of Trust. It order for the which mean it bought the loan
 19 from Quality Loan (the trustee), not the original lender Accredited. (See, Exhibit 3, Trustee's deed
 20 upon sale.) Mr. Macklin has alleged and has proved that the foreclosure sale violated California's
 21 foreclosure statutes. He thus has rebutted the presumption of legality that Deutsche says attaches
 22 to the foreclosure sale.

23 53. In short, Mr. Macklin has a strong case on the merits because he has at least three
 24 grounds for overturning the foreclosure sale of his home—the Notice of Default contained a
 25 material misrepresentation, Deutsche cannot prove it was the holder of his loan when foreclosure
 26 began, and the foreclosure violated the narrow terms of the Deed of Trust.

27 3. Irreparable Harm and Balance of Hardships

1 following orders:

2 a. A preliminary injunction against Deutsche forbidding it from taking any
3 steps to sell Mr. Macklin's home, transfer title, or otherwise interfere with Mr. Macklin's
4 possession and use of the home, which will remain in effect a pending the trial and judgment on
5 Mr. Macklin's adversary complaint, or until further order of the Court.

6
7 Dated: February 24, 2011

Respectfully submitted,

8 LAW OFFICES OF HOLLY S. BURGESS

9 By: /s/ HOLLY S. BURGESS

10 HOLLY S. BURGESS

11 Attorneys for Debtors
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